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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1031

KENNETH W. COLEGROVE, PETER J. CHAMALES AND JEROME G. KERWIN,
Plaintiffs-Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS AND AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS, DWIGHT H. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS, AND ARTHUR C. LUEDER, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,
Defendants-Appellees.

JURISDICIONAL STATEMENT OF APPELLANTS *

The Appellants, Kenneth W. Colegrove, Peter J. Chamales, and Jerome G. Kerwin, present this Jurisdictional Statement in accordance with the provisions of Rule 12 of the Rules of this Court.

(*) Unless otherwise indicated all italics in this Jurisdictional Statement and in Appendix II attached hereto have been inserted by the present writer.

I

Jurisdiction of the Supreme Court—Statutes, etc.

Jurisdiction of the Supreme Court of the United States to review the judgment in this cause here complained of, by direct appeal, is particularly authorized by Section 266 of the Judicial Code of the United States (Act of June 18, 1910, 36 Stat. 557, as amended; 28 U. S. C. A. Sec. 380) concerning the calling of a Special Three-Judge Court. General jurisdiction by direct appeal to the Supreme Court in this case, is authorized by Section 238, paragraph 3 of the Judicial Code (28 U. S. C. A. Sec. 345, sub. 3) generally concerning the subject of direct appeals to the Supreme Court.

Constitutionality of State Statute Involved

More particularly the Appellants show that the constitutionality of a Statute of the State of Illinois, hereinafter cited and mentioned, is involved in this cause within the purview of Section 266 of the Judicial Code above cited. That is true because this cause involves an application to the Federal Courts to restrain or suspend "the enforcement, operation or execution" of a Statute of the State of Illinois; also because the case involves an application for an Order "restraining the action of (State) officials" in the State of Illinois, in regard to the "enforcement and execution of such Statute"; and also because the Complaint in this cause is grounded in and based upon the denial "of the constitutionality of such Statute"; all of which ideas last above quoted are within the purview of Section 266 of the Judicial Code above cited.

The Illinois Statute Complained of

The particular Illinois Statute (which Appellants charge violates their rights, as guaranteed to them both under the

Federal Constitution and under the Constitution of the State of Illinois) is the so-called "*Legislative Apportionment Act*" of the State of Illinois, being entitled:

> "An Act to Apportion the State of Illinois into Senatorial Districts and to Repeal certain Acts therein named."

That Act was approved May 10, 1901, and still subsists in that State (Laws of Ill. 1901, p. 6; Ill. Rev. Stats. Ch. 46, Secs. 157, 158). That antiquated Act still fixes the boundaries of all of the 51 Legislative Districts of Illinois notwithstanding the fact that the Act became outmoded under the Constitution of the State of Illinois in the year 1911, and has since then been in conflict with the mandatory provisions of the Constitution of that State concerning Legislative Reapportionment. (Later on in this "Statement as to Jurisdiction" the particularities as to how that Act violates the Federal Constitution will be set forth and discussed item by item.) The particular provision of the Constitution of the State of Illinois which renders the Act of 1901, here under attack, unconstitutional and void is set forth in the following note.[1]

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(1) *Illinois Constitution—Apportionment*

The aforementioned provisions of the Constitution of Illinois, with respect to apportionment (as set forth in Article IV, Section 6 thereof) are as follows:

"Apportionment—Senatorial

"Section 6. The General Assembly shall apportion the state every ten years, beginning with the year 1871, by dividing the population of the state, as ascertained by the federal census, by the number 51, and the quotient shall be the ratio of representation in the senate. The state shall be divided into 51 senatorial districts, each of which shall elect one senator, whose term of office shall be four years. The senators elected in the year of our Lord 1872, in districts bearing odd numbers, shall vacate their offices at the end of two years, and those elected in districts bearing even numbers, at the end of four years; and vacancies occurring by the expiration of term shall be filled by

In substance the Illinois Act here under attack, enacted 46 years ago, apportioned the State of Illinois into 51 Legislative or Senatorial Districts, as required by the mandatory provisions of Article IV, Section 6 of the Constitution of Illinois, set forth at length in the note already mentioned. As required by that provision of the Constitution of Illinois a new and "equal" and just Legislative Apportionment Act should have been passed by the Legislature of Illinois in the year 1911, another in the year 1921, and another in the year 1931, and another in the year 1941. But as charged in the Complaint and admitted on this Record, the Legislature of Illinois has openly and continuously defied that constitutional requirement and has thereby violated the right of the Appellants to "equality" of elections, both under the provisions of the Constitution of the United States and a further particular provision of the Constitution of Illinois set forth in its Bills of Rights and hereafter particularly discussed.

Facts as to Gross Inequalities

It is charged in the Complaint, and is admitted on this Record, that due to the refusal of the Legislature to do its duty in the particulars last mentioned, gross and arbitrary and unjust inequalities, as between Legislative Districts, have come about and now exist in that State; caused by the large and rapid growth of population, and the wide and unusual shifts in population, which have particularly characterized the State of Illinois in the last half century.

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the election of senators for the full term. Senatorial districts shall be formed of contiguous and compact territory, bounded by county lines, and contain, as nearly as practicable, an equal number of inhabitants; but no district shall contain less than four-fifths of the senatorial ratio. Counties containing not less than the ratio and three-fourths, may be divided into separate districts, and shall be entitled to two senators, and to one additional senator for each number of inhabitants equal to the ratio contained by such counties in excess of twice the number of said ratio."

As a result of the failure of the Legislature of Illinois to comply with its mandatory Constitutional duty in the premises, there now exists in that State (and there has existed for many years past) the worst and most unjust and most violative situation, with regard to equal voting-power, as between citizens of the State, and as between different areas of the State, that is to be found in any State of the Union. For example it is charged in the Complaint and is admitted on this Record that:

A. One of the Illinois Districts is now 16 times as large, in population, as another nearby District; while in several other Districts there exists a situation which is only slightly less violative of the Democratic principle of equality in voting-power, as between the citizens of the State.

B. Another type of gross and violent discrimination exists between different areas of the State. Thus the Metropolitan area of Cook County (which includes the City of Chicago) now contains more than 51% of the entire population of the State; but under the antiquated Act of 1901 here complained of, Cook County has only 19 out of the State's 51 Legislative Districts.

II

Jurisdiction Assumed in Similar Cases

The Unusual Situation of 1932

As a part of this Jurisdictional Statement, the Appellants respectfully show the following unusual situation with respect to Congressional Apportionment Acts in a number of States which developed prior to the Congressional Elections of 1932, and following upon the re-allocation of Congressmen, among the 48 States, as required by the "Apportionment" Act of Congress of 1929. (55 Stat. L. 761; U. S. C. A. Title 2, Pocket Part, Sections 2a and 2b.)

That Act had reduced the number of Congressmen in a number of States, including Minnesota, Missouri, Mississippi and Kentucky; and had increased the number of Congressmen in a few States, including New York. As a result, new State Congressional Apportionment Acts were adopted in each of the States above mentioned. The Acts in each of those States were challenged by citizen-actions, and all five cases came before this Honorable Court in the year 1932.

Five Similar Cases

The Appellants show that this Honorable Court took jurisdiction in each of those cases; and thereby took up for consideration five cases, in that year, each of which was closely similar on jurisdictional grounds to the jurisdictional situation presented by this appeal, in the case at bar. The factual situation in those five cases is so pertinent and so significant on this appeal, that the Appellants are listing those cases here in bare and categorical form:

1. The case of *Smiley* v. *Holm, Secretary of State of Minnesota,* 285 U. S. 355, decided by this Court April 11, 1932. That case involved a Congressional Apportionment Act of Minnesota; and in and by its decision this Court reversed the Supreme Court of Minnesota and struck down the Minnesota Statute on the ground of its unconstitutionality. The result of the Court's decision and holding was to grant equitable relief to the Minnesota Appellants, enjoining the State Officials of Minnesota from enforcing that Act.

2. The case of *Koenig* v. *Flynn, Secretary of State of New York,* 285 U. S. 375, also decided on April 11, 1932. That case involved a Congressional Apportionment Act of New York; and in and by its decision this Court affirmed the judgment of the highest Court of the State of New York, which Court had in turn struck down and held invalid and unconstitutional the Act in question.

3. The case of *Carroll* v. *Becker, Secretary of State of Missouri,* 285 U. S. 380, also decided on April 11, 1932. This case involved a Congressional Apportionment Act of Missouri; and in and by its decision this Court affirmed the judgment of the highest Court of Missouri, which Court had in turn struck down the Act in question of the Legislature of Missouri.

4. The case of *Wood, Secretary of State of Mississippi* v. *Broom,* 287 U. S. 1, decided by this Court October 18, 1932. That case involved a State Congressional Apportionment Act of Mississippi. In and by its decision in the *Broom* case this Court took a somewhat opposite stand on the merits from what it had taken in the *Smiley* v. *Holm* case, *ante;* since this Court refused to affirm the judgment of the three-judge Federal Court below, which had stricken down the Mississippi Statute. It is unnecessary here to discuss further the particular holdings of this Court in the *Wood* v. *Broom* case.

5. The case of *Mahan, Secretary of State of Kentucky,* v. *Bruce,* 287 U. S. 575, decided in November 1932. That case involved a State Congressional Apportionment Act of the State of Kentucky. This Court, in and by its decision in that case (in a short Memorandum Opinion referring to the analogous case of *Wood* v. *Broom, ante*) refused to strike down the Kentucky Act.

5 Precedents in 1932

Whatever may be said about the conflict, in principle, between the *Wood* v. *Broom* case, ante (and the *Mahan* v. *Bruce* case) on the one hand, and the *Smiley* v. *Holm* case (and the *Koenig* v. *Flynn,* and *Carroll* v. *Becker* cases) on the other hand—and there is much to be said on that score—*the fact remains, that on jurisdictional grounds, each of those five cases is a clear authority and a precedent for this Honorable Court to take and review the Appeal in the Case at bar.*

The Closely Similar Illinois Case of 1946

6. Within recent months, and in June 1946, this Honorable Court took jurisdiction in and decided a closely similar case to that at bar; *Colegrove* v. *Green* (not yet officially reported) 66 S. Ct. 1198, 328 U. S. —. (Rehearing denied October 28, 1947, 67 S. Ct. 118; Motion for Reargument Before the Full Court, denied, November 18, 1947, 67 S. Ct. 199.)

This latter case involved the validity of the 1901 *Congressional Apportionment Act* of Illinois; whereas the case at bar (on closely similar factual and Constitutional grounds) involves the *State Legislative Apportionment Act* of Illinois, also passed in the same year. The 1946 case from Illinois is no doubt strongly in the minds of the seven members of this Honorable Court who heard and considered that case. For reasons that are obvious and implicit, this 1946 case from Illinois will be considered and commented on in some detail, later on in *Appendix II* attached to this Statement.

An Unusual Juristic Chapter—Appendix II

The foregoing six cases deserve and require that they be discussed and treated, for purposes of sound legal research, in a single and connected "story" in this Jurisdictional Statement. Indeed, they comprise, when taken together, a most interesting and rather remarkable Chapter in our American Constitutional Law. Because that "story" is longer than could fairly be told in this Statement, and yet is closely related to the immediate subject matter of this Court's Jurisdiction in the Appeal of the case at bar, it has seemed best to set out that Chapter, in summarized fashion, in *Appendix II* to this Jurisdictional Statement.

For reasons that will there be apparent, the recent case of *Colegrove* v. *Green, ante,* will be given special consideration in that *Appendix II.*

III

Judgment to Be Reviewed

The judgment to be reviewed here was rendered February 7, 1947, by the three-judge Court which had heard the Oral Argument and has considered the written briefs submitted by both sides on the hearing of the Defendants' Motion to Strike the Complaint and Dismiss the Cause. That Court, as a matter of fact, on January 28th had handed down a prior "Per Curiam" Memorandum or Opinion. Under the rules of this Court, this Memorandum Opinion is attached to this Jurisdictional Statement as *Appendix I.*

The Draft Order of the Trial Court allowing Appeal and fixing Appeal Bond, together with the approval of the other necessary papers and Pleadings on Appeal, were either entered by the Court or approved by the Court February 7, 1947.

IV

Nature of the Case

The Plaintiffs' Complaint charged that the Legislative Apportionment Act of Illinois of 1901, above cited, denies and impairs and abridges the Civil Rights of the Plaintiffs in that it violates (among others) the following provisions of the Constitution and Laws of the United States:

1. The Preamble of the Federal Constitution, concerning the "blessings of Liberty," etc.

2. Its General Provisions guaranteeing "equal rights" of citizens, etc.

3. 14th Amendment, Sec. 1, concerning "privileges and immunities" of citizens, and the right to "equal protection of the laws," etc.

4. The "Northwest Ordinance" of 1787, Art. II, guaranteeing proportionate representation of the People in the Legislature," etc.

5. The Enabling Act of Congress of April 18, 1818, admitting Illinois to the Union; and specifically binding the State to the last mentioned guaranty.

The Complaint also charges a violation of the following provisions of the Constitution of Illinois:

6. The Preamble of the Constitution of Illinois of 1818, concerning the Northwest Ordinance and Election of Representatives.

7. The Constitution of Illinois of 1870, Art. II, Sec. 6, concerning "free and equal" elections.

8. The Constitution of the State of Illinois, Art. IV, Sec. 6, making it mandatory on the Legislature to reapportion the State every 10 years.

The Civil Rights Act

The Appellants specifically show that the District Court had original jurisdiction in this case, and that this Court has jurisdiction to review this case, under Section 41, paragraph 14, of the Civil Rights Act. (Revised Statutes of the U. S., Sections 563 and 629, as amended; 28 U. S. C. A., Section 41, paragraph 14.)

Injunctive Relief Prayed

The Complaint, which was verified, prayed for Injunctive Relief, restraining the Defendants (Illinois State Election officials) from enforcing the provisions of the Illinois Legislative Apportionment Act of 1901, on the ground that it was unconstitutional and void, as violating the Constitutions and Laws above enumerated.

The Plaintiffs also filed an additional and separate verified Petition asking for a Temporary Injunction for the same reasons.

V

Rulings of the Trial Court

The District three-judge Court on December 17, 1946, took jurisdiction of the cause and heard extended Oral Argument based upon Plaintiffs' verified Complaint and the Defendants' written Motion to Dismiss the Complaint and Dismiss the Cause for Want of Jurisdiction. It was stated by the Trial Court on the Oral Argument and was understood by all concerned that the Court would treat the Defendants' Motion to Strike and Dismiss as a General and Special Demurrer.

The rulings of the Trial Court are contained in and indicated by:

A. The Court's "Per Curiam" Memorandum Opinion of January 28, 1947, above mentioned, which dismissed the Complaint.

B. A draft Order entered February 7, 1947, above mentioned, which dismissed the cause.

VI

A Federal Question Involved

THE CHARGE IN THE COMPLAINT BELOW THAT THE ILLINOIS LEGISLATIVE APPORTIONMENT ACT OF 1901 IS UNCONSTITUTIONAL AND VOID ON THE FACTS SET OUT IN THE COMPLAINT AND ADMITTED ON THIS RECORD, CONSTITUTES AND RAISES A SUBSTANTIAL FEDERAL QUESTION FOR THE FOLLOWING REASONS:

A. That Act violates the Civil Rights of the Appellants as guaranteed by several general provisions of the Constitution of the United States.

B. That Act violates other basic and fundamental laws of the United States applicable to and controlling

over the government of the State of Illinois, and particularly the so-called "Northwest Ordinance" of 1789, and also the so-called Enabling Act of 1818 admitting the State of Illinois to the Union.

C. The gross inequalities in the voting power of electors, as between different citizens of Illinois at elections held under that Act, likewise violates the provisions of the Federal Constitution mentioned in "A" last above and the provisions of the other basic laws of the United States mentioned in "B" last above.

D. That Act violates the rights of the Appellants as citizens and electors of the State of Illinois as such rights are guaranteed to Appellants under the 14th Amendment of the Constitution of the United States.

E. That Act violates the fundamental principle of equality of voting as between Illinois citizens as specifically guaranteed by the Constitution of Illinois, and thereby implicitly violates the fundamental principle of Representative Government, as guaranteed by the Federal Constitution.

A. General Federal Protection as to Civil Rights and Equality in Voting

The right of the Appellants to vote in Illinois elections, even for Representatives in the Legislature of that State, on a basis of substantial equality with other citizens, is a right generally guaranteed and protected by the Federal Constitution. This right of equality of voting before the law, even in State elections, prevents the State from imposing arbitrary and excessive and violent restrictions and discriminations on its citizens as between each other. This right of equality of voting as against arbitrary and senseless discriminations, no matter what the election involved, has been repeatedly upheld and sustained by the Supreme Court of the United States. We will here refer to and cite merely two earlier classic cases on the point, namely *Ex*

parte Siebold, 100 U. S. 371 and *Ex parte Yarbrough*, 110 U. S. 651; and also the two latest cases laying down that general doctrine, namely *United States* v. *Classic*, 313 U. S. 299 at p. 314, and *Smith* v. *Allwright*, 321 U. S. 649 at p. 661.

Gross Inequality the Equivalent of Disfranchisement

The plain sense of the matter is that such gross inequality in voting power, as is shown by the Complaint below and admitted on this Record, is the equivalent of actual disfranchisement of voters. Here again we might cite several statements of the law on this point as announced by the Supreme Court of the United States; but we content ourselves by giving a short quotation from the Opinion of the three-judge Trial Court in February 1946, rendered by the same Illinois District Court as that below, in the Trial Court's Opinion in the closely analogous "Congressional Redistricting Case" of *Colegrove* v. *Green*, which was before this Honorable Court in June 1946, and is cited above. In its Opinion in that case below the Trial Court, speaking through Presiding Judge Honorable Evan A. Evans, discusses this precise Point and said:

> *"Inequality in population of the Districts is so contrary to the spirit of the government and of the Constitution that we would assume it was a required condition to representation in the Congress of the United States. There is little or no difference between an unequal voice in the election of members of Congress and a denial of participation in the election of Congressmen."*

The Preamble of the Federal Constitution

The Preamble to the Constitution of the United States we respectfully submit has not, down to this time, been sufficiently relied upon by the Federal Courts as a guaranty

of the civil rights of citizens. That Preamble expressly recites that one of the major purposes of the Constitution is

> "to secure the blessings of liberty to ourselves and our posterity."

We respectfully but urgently ask this Court if the "blessings of liberty" have been secured to these Appellants and the other citizens of Illinois when the Act of 1901 of the State of Illinois, here under attack, is considered? And if the answer to that question is in the affirmative then we state positively that a very substantial Federal question is involved on this Appeal.

The General and "Basic Principle of Equality"

This Honorable Court in the case of *Truax* v. *Corrigan*, 257 U. S. 312, at p. 331, speaks of the "basic principle of equality" as between citizens and does so on the clear assumption that such a doctrine is an accepted principle of the fundamental constitutional law of the United States. We respectfully say that the right to vote on a substantial basis of equality, even in State elections, as against atrocious and vicious discrimination, like that disclosed on this Record, comes within the doctrine laid down by this Court in the *Truax* v. *Corrigan* case.

In *United States* v. *Classic, supra*, this Honorable Court announced the doctrine that the right to vote included the right to have the vote honestly and fairly counted. How can such a doctrine be reconciled with the admitted fact that in one Legislative District in Illinois the voters therein have 16 times the voting power of citizens in a nearby District?

In *Smith* v. *Allwright, supra*, this Court held that the denial by a State of the right to vote, through some procedural device (seeking to eliminate negroes from vot-

ing in a State Primary) constituted a denial of the right to vote as guaranteed by the Federal Constitution.

We therefore say on this Jurisdictional Statement that the right to vote on a basis of substantial equality before the law, and the right to be protected against arbitrary and outrageous discrimination as between voters, is a right fully guaranteed by the Federal Constitution, even in State elections.

We most respectfully say, therefore, that the Federal Constitution generally protects these Appellants from the gross discrimination as between voters, which is admitted on this Record, under the Illinois Act of 1901 here under attack.

B. The "Northwest Ordinance" of 1789 and the Enabling Act of 1818 Admitting Illinois to the Union

The "Northwest Ordinance." Counsel for these Appellants is fully aware, for the purposes of this Jurisdictional Statement, of the general doctrine laid down by the Supreme Court of the United States that the Ordinance of 1789 has been merged into the basic laws and constitutions of the various States of the Union wherever applicable, so far as the provisions of the Northwest Ordinance are of general concern to the States of the Union.[2] That principle is an accepted doctrine of our American law, which we recognize and abide by.

But here a different situation exists since it is particularly charged in the Complaint and admitted on this Record

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[2] See *Wallace* v. *Parker*, 31 U. S. 311, 6 Pet. 680; *Jones* v. *Van Zandt*, 5 How. 215; *Permoli* v. *New Orleans*, 3 How. 589; *Strader* v. *Graham*, 10 How. 82; *Penna.* v. *Bridge Co.*, 18 How. 421; *Bates* v. *Brown*, 5 Wall. 710; *Messenger* v. *Mason*, 10 Wall. 507; *Clinton* v. *Englebrecht*, 134 Wall. 434; *Langdean* v. *Hanes*, 21 Wall. 521; *Morton* v. *Nebraska*, 21 Wall. 660.

that, under the Northwest Ordinance and the Enabling Act of Congress of 1818 admitting Illinois to the Union and under the Preamble of the First Constitution of Illinois of 1818, the State of Illinois specifically adopted and wrote into its future basic law the following provision of the Northwest Ordinance as a special commitment forever binding upon the State:

> "The inhabitants of the said Territory shall always be entitled to the benefits * * * of a proportionate representation of the people in the Legislature * * *." (See Constitutional volumes U. S. C. A. and particularly Vol. I, p. 18 et seq.)

While there is no particular decision of the Supreme Court of the United States or indeed of the Supreme Court of Illinois discussing the precise point we are here concerned with, that point has been before the Supreme Court of Indiana and has been upheld in vigorous language in a leading case in that State, *Denny* v. *The State*, 144 Ind. 503, 42 N. E. 929. The result of that decision is to hold flatly that the language of the Northwest Ordinance quoted above is still a part of the basic law of each State organized out of the Northwest Territory and is particularly binding on those States in the matter of State Legislative Apportionment Acts.[3]

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[3] In its Opinion the Indiana Supreme Court lays down the doctrine that a State Apportionment law that violates the State Constitution is subject to attack in a taxpayer's Bill, just like any other Act. The Court cites cases on this point from Wisconsin, Michigan, New York and particularly the case of *People* v. *Thompson*, from Illinois, reported in 155 Ill. 451, 40 N. E. 307.

The Court further holds that the language above quoted in this Jurisdiction Statement from the Northwest Ordinance, concerning equality of voting for the "Legislature" has become embedded in the basic fabric of the law of the States carved out of the Northwest Territory. On this point the Supreme Court of Indiana said:

> "The principle of proportionate representation has always obtained in Indiana, even from a time preceding the formation of the

Enabling Act of Illinois of 1818

The Act of Congress of 1818 admitting Illinois to the Union (3 Stat. L. 428) is directly interwoven into the point we are here discussing. One of the provisions of that Statute was that the State of Illinois shall never adopt or maintain any laws "repugnant to the Ordinance of the 13th of July 1787." If that language meant anything it meant (and still means) that as a condition to entering the Union the State of Illinois undertook to carry out the guaranty, with respect to equality of voting for its Legislature, quoted above from the language of the Northwest Ordinance. We will not further stress this point here.

Preamble of First Constitution of Illinois of 1818

Following the requirement of the Enabling Act of 1818 admitting Illinois to the Union on the conditions above recited, the Preamble of the First Constitution of Illinois of 1818 specifically stated and adopted the binding commitments of the Northwest Ordinance. Indeed that Preamble goes further and specifically recites that the government of Illinois shall forever be

> "consistent with the Constitution of the United States and the Ordinances of Congress of 1787 and the law of Congress approved April 18, 1818." (Being Enabling Act of that year admitting Illinois to the Union.)

Constitution of the United States. From the passage of the Ordinance for the government of the Northwest Territory July 13, 1787, out of which Territory our Commonwealth was afterward formed, this principle of proportionate representation has been of the very essence of our local self government. The Ordinance of 1787 names proportionate representation in the same category with the writ of *habeas corpus*, trial by jury, and due process of law, as fundamental rights to which the people of this territory shall always be entitled. * * * So that for 100 years the unvarying law of this territory and State has been, as affirmed by the Fathers of 1787:

> "'The inhabitants of the said territory shall always be entitled to the benefit of * * * a proportionate representation of the people in the legislature. * * *'"

By that provision of the Constitution of 1818 in its Preamble, the State of Illinois stepped into a different category and a different status with respect to the Ordinance of 1787 than is true of any State which did not enter into that binding commitment in its Constitution.

We make this point and urge it sincerely on this Court in this Jurisdictional Statement, even though we are aware of the holdings of this Court with respect to the general doctrine concerning the modern continuation of the provisions of the Northwest Ordinance announced by this Court in the cases cited in foot-note (2).

Summary on This Point

In summary on this point we respectfully say in this Jurisdictional Statement that the contentions set forth in the Complaint below, with respect to the Ordinance of 1787, the Enabling Act of 1818 admitting Illinois to the Union and the Preamble of the First Constitution of Illinois of 1818, present new and unusual Federal questions which this Court has never so far considered or passed upon. We say further that the Act of Illinois of 1901 here under attack is in violation of the Northwest Ordinance, the Enabling Act of 1818 and the Preamble of the First Constitution in the respects hereinabove set forth. We further say that the Motion to Strike has admitted these matters so far as they are well pleaded. Accordingly we suggest that these matters deserve a fresh and untrammeled consideration by this Court irrespective of the holdings of this Court concerning the Northwest Ordinance in the line of cases cited in the note last above given.

C. As to Gross Inequalities in Voting Power, etc.

This topic has been discussed and covered by us for the purposes of this Jurisdictional Statement by our comment above under paragraphs A and B. We will not further discuss the point here.

D. Appellants' Rights under the 14th Amendment

The "Privileges and Immunities" Guaranty. The general right to vote is one of the "privileges and immunities" guaranteed to the citizens by the language of the 14th Amendment. Under the "Slaughter House Cases", 16 Wall. 36, this Honorable Court decided that the "privileges and immunities" clause of the 14th Amendment enlarged and protected the privileges and immunities of citizens, growing out of Federal citizenship. The decisions of this Court in *United States* v. *Classic, ante,* and *Smith* v. *Allwright, ante* (as well as other analogous cases), make it clear that the right to vote on a basis of equality with other voters, as against arbitrary and excessive and senseless discrimination, is one of the privileges of United States citizenship. In view of the comment we have made about the Preamble of the Constitution of the United States, and in view of the general theory of our Federal Constitution, we say that this point can hardly be disputed, and we will not labor it further.

The "equal protection" clause. For the same reasons last above urged we respectfully suggest and insist that the "equal protection" clause of the 14th Amendment protects these Appellants as Illinois citizens against the gross and arbitrary and atrocious discrimination in voting which this 1901 Illinois Act here complained of fastens upon the people of the State of Illinois. Indeed here is a State Statute which is admittedly violative of a mandatory provision of the Constitution of Illinois, that by its very terms fixes upon the people of the State of Illinois, including these Appellants, a sort of strait-jacket under which they are hopelessly bound and have continued to be bound for more than a full generation of 36 years, and without the slightest hope of any relief, as charged in the Complaint and admitted on this Record, so far as the Legislature of the State of Illinois and the Courts of Illinois are concerned.

A Most Substantial Point

We will not discuss the point about the 14th Amendment further in this Jurisdictional Statement, except to say that it is perhaps the most substantial and important guaranty upon which these Appellants can rely; that is if constitutional guaranties are to be weighed in the balance one against the other. We will simply cite on this point the following cases, which are thoroughly familiar to this Court.

Nixon v. *Condon*, 286 U. S. 73;
Missouri ex rel. Gaines v. *Canada*, 305 U. S. 337.

E. The Bill of Rights of the Illinois Constitution

It is charged in the Complaint and is admitted on this Record that ever since the year 1911 the Act of Illinois here under attack has been a gross violation of Art. II, Section 18 of the Constitution of Illinois, being one of the provisions of the Bill of Rights of that State, which provides as follows:

"Section 18. All Elections shall be free and equal."

Flagrant Denial of Rights by the Legislature and the Courts

We say that that guaranty is enforceable by these Appellants in the Federal Courts when the Complaint charges, and it is admitted on this Record, that that guaranty has been flagrantly ignored and has been denied to the Appellants by both the State Legislature of Illinois and by the Courts of the State of Illinois. One of the provisions of the Constitution of the United States guarantees to the citizens of the United States, including these Appellants, the right of the equal protection of the laws, where it is charged and admitted, as in the case at bar, that the State of Illinois has openly and defiantly abrogated the equal protection of

its own laws and indeed the protection of the above quoted provision of its Bill of Rights, then a substantial Federal question is raised which gives the Federal Courts jurisdiction of the controversy.

It is frankly admitted that here is a novel and original question; namely, how far the Federal Courts have jurisdiction to protect citizens of the United States where it is charged and admitted that the State government of the particular State itself denied the equal protection of the laws to this complaining citizen. We say that this question is a substantial Federal question, which clearly gives this Court jurisdiction and which should appeal strongly to the sense of justice of this Court in its consideration of this Jurisdictional Statement.

Summary as to Substantial Federal Question Point

It is respectfully but earnestly suggested that, for the five substantial reasons set forth in Items A, B, C, D and E above, this Appeal in the case at bar sets forth substantial Federal questions, coming within the Rule of this Honorable Court and the practice and procedure of this Honorable Court with respect to reviewing Direct Appeals.

VII

A "Justiciable" Controversy—State Cases as to Apportionment Acts

It will be seen from the foregoing discussion that this Honorable Court in at least three cases (*Smiley* v. *Holm, ante,* from Minnesota; *Koenig* v. *Flynn, ante,* from New York; and *Carroll* v. *Becker, ante,* from Missouri) took jurisdiction and reviewed the action of the Trial Courts involving State Statutes in those States, where the cases were concerned with gross inequalities and arbitrary dis-

crimination in the matter of Congressional Districts in those States. Since this Appeal is particularly concerned with the validity of Legislative Districts, charged to be grossly unequal and arbitrary in their population, it is believed this Court will be interested in the rulings of the various State courts on the ground whether a suit by a citizen and elector, charging that a State Legislative Apportionment Act, is so grossly unfair and arbitrary as to be unconstitutional, presents a "case or controversy" so as to be justiciable and reviewable by the courts.

A Famous Case

Nearly a century ago, and beginning with the famous case "Opinion of the Justices" 10 Gray (76 Mass.) 613, decided in 1858, the doctrine became firmly established as the law of the land in the United States that a suit by a citizen, challenging the constitutionality and validity of a State Legislative Apportionment Act, presents a "justiciable" controversy of which the courts would take jurisdiction. In that case the Massachusetts court laid down the doctrine that

> "The great principle of equality of representation * * * lies at the foundation of" (American State Government).

In the 90 years that have elapsed since that case was decided at least 24 States have followed the lead of Massachusetts and have upheld the doctrine that such a suit by a citizen and voter presents a "case or controversy", of which the courts will take jurisdiction.[4] In each of those

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[4] A good Statement of this doctrine is found in a Note in 2 A.L.R., pp. 1337 to 1359 on the general subject

*"Inequality of population * * * as invalidating apportionment of representatives"*

States it has been flatly held, that where the Legislative Apportionment Act grossly and arbitrarily violates the principle of equality among voters, the Act will be stricken down as unconstitutional in the same way that any other unconstitutional Act will be stricken down.

The Note above discussed gathered the cases, which were found in the Books down to the time of its compilation in the year 1919. The further annotations of that Note disclose the following modern additional cases on the point.

Modern State Cases

The extended Note in 2 A. L. R. 1334, from which the language above was quoted is taken from the Report of *Donovan* v. *Suffolk County Apportionment Commissioners*, 225 Mass. 55, 30 N. E. 740, decided by the Supreme Judicial Court of Massachusetts in 1916. That Note gathers all of the significant State cases found in the Reports down to that time. Since the compilation of that Report a number of significant State cases have appeared, some of which will be commented upon in summary fashion.

A Significant Recent Case

The most recent case in the Books, where a State Court has stricken down a discriminatory Legislative Apportionment Act—and a case which for many reasons deserves a major place in any discussion of this subject—is *Jones* v.

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the "Introduction" of this Note states:

> "The principle of equality of representation lies at the foundation of Representative Government, and it requires that no voter shall exercise in the selection of the Legislature a greater voting power than other voters."

In the Text of that Note 36 separate State cases are cited, and discussed on this particular question from the 15 States of Illinois, Massachusetts, New York, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Nebraska, Ohio, Texas, Washington and Wisconsin.

Cordell, Sec'y. State Election Board of Oklahoma etc., 168 Pac. (2d) 130, decided by the Supreme Court of Oklahoma in April 1946. A closely similar case decided by the Supreme Court of Oklahoma in 1944, *Jones* v. *Freeman*, 146 Pac. (2d) 564, should be considered in connection with this later Oklahoma case.

In the case decided by the Supreme Court of Oklahoma in April 1946, the Court in striking down an arbitrary and discriminatory State Apportionment Act said:

> "The principle of equality of representation lies at the very heart of representative government." 18 Am. Jur. p. 192.

In discussing the point that such a case was "justiciable", even though it might be highly tinged with what has been called "political questions", the Oklahoma Court said:

> "By 1938 the Courts of 22 States had exercised the power, or had stated that they had the power, to review Legislative Apportionment Acts upon constitutional grounds; and no Court had denied that it possessed such power." (Citing Annls. Am. Acd. Potl. Soc. Sci., Vol. 95, p. 11.)

The Fallacious Doctrine of Judicial Expediency

Another significant modern case, which deserves consideration in any study of this subject is *Armstrong, Sec'y. of State of Colorado* v. *Mitten*, 37 Pac. (2d) 757, decided by the Supreme Court of Colorado in 1934. That was a Declaratory Judgment proceeding (just as is the case at bar) against the Secretary of State to have a Legislative Apportionment Act of Colorado declared invalid and unconstitutional. The Supreme Court of Colorado granted the relief prayed and said, among other things:

> "The General Assembly, although it met in 1921, 1923, 1925, 1927, 1929 and 1931, failed at those Sessions to obey the constitutional mandate."

That language is particularly apt and pertinent to the case at bar; but in the case at bar the defiance of the Legislature instead of lasting a single decade has lasted for 36 years. The Court there was cognizant of the "inconvenient results" that might follow its decision, but nevertheless the Court was frank and fearless on this point and said:

> "Undoubtedly there are inconvenient and deplorable results * * * but whatever the facts may be * * * the courts in construing the Constitution are bound to suppose that inconveniences involved in the application of its provisions, according to their plain terms and import, were considered in its formation."

Here is a sensible and pertinent reply to the doctrine of expediency sometimes held out by the courts in refraining from interfering in the activities of the Legislature in these Apportionment cases, even though the action of the Legislature is grossly unconstitutional. The Colorado court well points out that the "inconvenient and deplorable results", that may flow from a court decision striking down a State Apportionment Act, will be held to have been "considered in the formation" of the constitutional mandate involved. It is not for the Court to hesitate about grounds of expediency and "inconvenient results" in such matters.

Judicial Expediency Again Condemned

The Oklahoma court in the case discussed above cites and relies on a leading case from Kentucky *Stiglitz, County Clerk,* v. *Schardien,* 239 Ky. 799, 40 S. W. (2d) 315, decided in 1931. That was an action contesting the constitutionality of a State Apportionment Act of Kentucky. The Districts set up by the Act had varied in population from 9442 to 60,457; an arbitrary and unequal variation, which is substantially less than is found in the case at bar. In striking

down the Act as invalid and unconstitutional the Oklahoma Court said:

> "The Constitution in all its terms breathes the spirit of command (citing cases). And while the people must depend upon the patriotism and consciences of the Legislators, under the power of sound public opinion, for the enactment of laws to accord with constitutional mandates, yet it is within the province of the power of the courts to declare void and ineffective for any purpose all Acts of the General Assembly in violation of express provisions of the Constitution."

"Humiliating Experiences" etc.

Another recent leading case is *State ex rel.* v. *Bricker, Governor,* 139 Ohio St. 499, 41 N. E. (2d) 377, decided by the Supreme Court of Ohio in 1942. That was a proceeding to strike down a State Legislative Apportionment Act and to compel the State Apportionment Board to set up a new and fair and equal state apportionment as required by the Constitution. In granting the relief prayed, the Supreme Court of Ohio quoted from the early case of *State ex rel. Evans* v. *Dudley,* 1 Ohio St. 437. That early case had considered the provision of the Constitution of Ohio which sets up a "State Apportionment Board" for that State and lodges the duty of redistricting the State in that Board, instead of in the Legislature. In explaining the reasons for the adoption of that provision, the Ohio Court in the early case used language which is quoted again in the recent Ohio case, when it said with respect to the defiance of the Legislation to carry out the constitutional mandate concerning apportionment:

> "The State had been subjected to a most humiliating experience while the power was left with the General Assembly, and scenes of anarchy and confusion * * * marked its exercise there."

All of the citizens of Illinois for more than a generation have been compelled to hang their heads in embarrassment when they have been forced to consider the "humiliating experience" of the Illinois Legislature which through the years has shown itself a lawless and defiant body because of its recalcitrant and almost anarchistic attitude toward its constitutional duty in the premises.

The Same Principle Involved

It is admitted here that the case at bar below and this Appeal involves what may be said to be a further step in the Law; in that here a State Legislative Apportionment Act is under attack in the Federal Courts rather than in the State Courts. The Complaint charged and it is admitted on this Record that Federal jurisdiction is sought here, for the blunt factual reason that both the State Legislature of Illinois and the Supreme Court of Illinois have denied the Appellants "equal protection of the laws," and have denied all further relief in the premises; so that it is only by way of Federal relief that the Appellants can ever hope to break down this arbitrary and unconscionable Illinois Statute here under attack.

It is believed and it is here urged that the fundamental principle of equality of voting rights is the same, whether the protection of that right is sought in the State courts or in the Federal Courts. And where the suit in the Federal courts shows, and it is admitted by the Defendants, that the citizens have sought relief from the State Legislature and the State courts for many long years, without avail, then their right to resort to the Federal courts is established.

Summary as to State Cases

It is respectfully submitted that these State cases, while not in any sense binding upon this Honorable Court, never-

theless will be helpful and informative to the Court in passing on the question of taking jurisdiction in this Appeal of the case at bar.

Conclusion

For the reasons urged in the foregoing Statement as to Jurisdiction and the Suggestions as to Law Points incorporated therein, it is respectfully submitted that this Court has jurisdiction of this case upon this Appeal, and that Substantial Federal Questions are here presented.

Realistic and Wholesome Effects Anticipated

These Appellants and their Counsel are alike, fully cognizant of, and appreciative of, the grave and difficult problem which this Appeal presents to this Honorable Court. This Court knows how the Appellants and their Counsel carried through this Court, within recent months the closely analogous case concerning "Congressional" Reapportionment. The resulting effect of the opinions of this Court, handed down last June in that case, on public opinion in Illinois, and particularly upon the Officials of the State of Illinois, has been realistic and wholesome and effective. Indeed this Court can take judicial notice at the present time from the public prints and elsewhere, that the currently sitting session of the General Assembly of the State of Illinois is even now engaged in the passage of a new Congressional Apportionment Act for that State. It is a matter of common knowledge in Illinois, and a matter of general comment throughout the State, that the Opinions of this Court in the recent case, even though they were not in agreement, have galvanized the Legislature of the State into action in that particular field.

But this Court also can take judicial notice of the fact that no such progress of achievement has been made or is

contemplated in the General Assembly of Illinois with respect to Legislative Apportionment in that State. Indeed it has been openly announced within recent days, in the month of February 1947, by responsible Illinois Officials that the subject of Legislative Apportionment will not be considered. (See for example "Exhibit A" attached hereto.)

The mere action of this Honorable Court in taking the "Congressional" case from Illinois, and the words of that Court in the several Opinions in that case, had a resounding and beneficial effect not only in Illinois but throughout the country. Indeed like Joshua's trumpet and the walls of Jericho, the action of this Court in that case has blasted away and destroyed the long tradition of defiance and obstruction which has been so vigorously persisted in in Illinois.

With all due respect therefore it is urgently suggested that if this Honorable Court will take jurisdiction of the present Appeal, and consider the case on the merits, that fact in itself will go a substantial way toward bringing about realistic and beneficial results in Illinois in the field of Legislative Apportionment, as well as Congressional Apportionment.

Respectfully submitted,

URBAN A. LAVERY,
Counsel for Appellants.

Dated at Chicago, Illinois, February 13, 1947.

EXHIBIT "A"

TYPICAL ITEMS IN THE PUBLIC PRINTS CONCERNING THE PROPOSED NEW CONGRESSIONAL REAPPORTIONMENT BILL FOR ILLINOIS

Chicago Sunday Tribune: Feb. 9, 1947

Remapping Bill

Call Measure's Chances Best in Years

By Robert Howard

Gov. Green's success in getting Illinois congressmen to agree in advance to reapportionment of congressional districts led to predictions yesterday that the redistricting bill has the best chance in decades of being approved by the legislature.

Incumbent congressmen, especially those downstate who objected to changes in their own districts, have been chief opponents of reapportionment in the past. All congressmen from both parties have approved the new plan, under which Cook and Lake counties would have 13 of the 26 districts. The two metropolitan counties now have only 10 congressmen.

Calls Plan Reasonable

"I believe this reapportionment plan is reasonable and fair, and I hope the legislature will give it the full consideration it merits," Gov. Green said as he returned from Washington, where he conferred with the congressional delegation.

Optimism about the chances of congressional redistricting was expressed by the governor and by Rep. Franklin U. Stransky [R., Savanna] and Sen. Rice W. Miller [R., Hillsboro], legislative chairmen who accompanied him to Washington.

In an effort to correct inequities under which Chicago has the largest and smallest districts in the nation, Atty. Urban A. Lavery attacked the present districting, which has been unchanged since 1901, last year in a test case. He lost the

appeal, but *a United States Supreme court warning that congress should act if Illinois continues to neglect reapportionment was one of the factors giving the issue greater consideration by the legislature.*

Chicago Daily Tribune

The World's Greatest Newspaper

Founded June 10, 1847

18 ** Thursday, Feb. 13, 1947

A Redistricting Bill That Should Pass

When the legislature returns to Springfield on Feb. 18, Rep. Stransky and Sen. Miller will introduce a bill to revise the congressional map of the state. There has been no redistricting to take account of the changes in population since 1901.

The two sponsors of the bill were with Gov. Green on his recent trip to Washington and joined him in his conference with the members of congress from Illinois. The governor returned with the welcome news that he had won unanimous approval from the Illinois delegation, Democrats as well as Republicans, of the map he had presented.

This is as warm a tribute as could be desired to the fairness of the proposals. As must be obvious to any one acquainted with the problem, a mathematically perfect solution is a practical impossibility. The best that can be expected is approximately equal districts and that result has been achieved. The variations between the largest and the smallest districts have been reduced to a few thousands of population in contrast to the present difference of nearly 900,000 between the huge 7th district and the shrunken 5th.

The plan the governor and his colleagues have worked out gives 13 congressmen to the downstate area and as many to Cook and Lake together. As somewhat more than half the state's population lives in the northeast corner of Illinois, there remains a slight discrimination against the metropolitan area but it is so small as to be negligible. The solution is as nearly ideal as any one could expect and should be adopted promptly.

APPENDIX I
to
Appellants' Jurisdictional Statement

NOTE: The following Memorandum "Per Curiam" Opinion was handed down by the three-judge Trial Court who heard and disposed of this case below. The "Per Curiam" Opinion obviously is the language of the Court as a whole rather than of any particular Judge thereof. The names of the Judges who handed down this Opinion are found at the foot thereof.

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 46C1926

KENNETH W. COLEGROVE et al.

vs.

EDWARD J. BARRETT et al.

Memorandum

"Before Kerner, Circuit Judge, and Barnes and Campbell, District Judges

"Per CURIAM:

"This cause is before the court on the motion of the defendants to strike the complaint and to dismiss the cause.

"But for the decision of the United States Supreme Court in *Wood* v. *Broom*, 287 U. S. 1, the action of that court in denying the petition for a rehearing in *Colegrove* v. *Green*, 67 S. Ct. 118 (328 U. S. —), and the action of that court in dismissing the appeal in *Cook* v. *Fortson*, 67 S. Ct. 21 (328 U. S. —), we would have thought the law to be as stated by Mr. Justice Black in his dissenting opinion in *Colegrove* v. *Green*, 66 S. Ct. 1198 (328 U. S. —). It appears, however, that the action of the Supreme Court on questions like unto that here presented requires a dismissal of the complaint before us for want of equity.

"The complaint is, accordingly, dismissed.

OTTO KERNER,
United States Circuit Judge;
JOHN P. BARNES,
United States District Judge;
WILLIAM J. CAMPBELL,
United States District Judge.

"January 28th, 1947."

APPENDIX II

An Unusual Juristic Chapter in the Reports of This Court

In the foregoing Jurisdictional Statement (pp. 1 to 29 *ante*) there appears a short and summarized appraisal of 6 separate cases, in each of which this Honorable Court has had before it a controversy involving State Apportionment Acts.[5] In the Jurisdictional Statement it is further suggested that the "story" of these 6 cases should be taken together for the purposes of sound legal research in analyzing and appraising the effect of those cases. This is particularly true so far as the question of the jurisdiction of this Honorable Court to review the case at bar on this Appeal is concerned. Accordingly there is given in this Appendix II an over-all discussion of those 6 cases chiefly on their factual side; in order that this Court may have before it what may be called a complete picture of its own holdings and its own action in those cases.

It is respectfully but earnestly suggested that this comprehensive story of those 6 cases makes a strong claim on the jurisdictional side for a review of this Appeal in the case at bar by this Court and particularly at this time.

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[5] These cases are : *Smiley* v. *Holm, Secretary of State of Minnesota*, 285 U. S. 355; *Koenig* v. *Flynn, Secretary of State of New York*, 285 U. S. 375; *Carroll* v. *Becker, Secretary of State of Missouri*, 285 U. S. 380; *Wood, Secretary of State of Mississippi* v. *Broom*, 287 U. S. 1; *Mahan, Secretary of State of Kentucky* v. *Bruce*, 287 U. S. 575; *Colegrove* v. *Green, Governor of Illinois*, 66 S. Ct. 1198, 328 U. S. —.

Five Cases in 1932

As suggested in the foregoing Statement the first five of those cases came before this Court in the year 1932; and the five cases growing out of the application in certain States of the Act of Congress of June 18, 1929, dividing the 435 members of the House of Representatives among the 48 States of the Union. (55 Stat. L. 761; U. S. C. A. Title 2, Pocket Part, Sections 2a and 2b.) That Act had reduced the number of Congressmen in several States, including Minnesota, Missouri, Mississippi and Kentucky; and had increased the number of Congressmen in other States, including New York. The result was that it became necessary in each of the five States mentioned to have a new Congressional Apportionment Act. In the passage of those Acts in the State Legislatures the usual selfish and political motives appeared, with the result that a certain amount of gerrymandering took place and the Acts were in all cases arbitrary and unequal, so far as the Districts created were concerned. Because of the gross inequalities and other discriminatory features of these Acts, they were in each instance brought under attack by citizens and voters and in all of the States last mentioned the cases came before this Honorable Court in the calendar year of 1932 as suggested.

The Minnesota Case of 1932

The first of these cases to reach this Honorable Court was the Minnesota case of *Smiley* v. *Holm, Secretary of State*, 285 U. S. 355. That case had been decided below by the State Supreme Court in October 1931 (184 Minn. 228, 238 N. W. 494). This Court in February 1932 granted Certiorari (284 U. S. 616). The case was argued before this Court March 16 and 17, and decided April 11, 1932. The holding and judgment of the Minnesota Supreme Court was reversed, and the relief prayed against the Minnesota Act was granted by this Court.

The Statement of the case shows that the Act of Congress of 1929 above mentioned had reduced the number of Congressmen from Minnesota from 10 to 9. Accordingly in April 1931, the Minnesota Legislature (Laws of Minn., 1931,

p. 640) attempted to pass a State Congressional Apportionment Act, dividing the State into 9 Congressional Districts. The Districts, however, were so unequal and discriminatory that they varied from a population of 228,596 for the smallest District to a population of 326,391 for the largest District. The Governor of the State accordingly vetoed the Bill. The State Legislature then attempted to pass the Bill over the Governor's veto and failed. Thereupon a majority of the two Houses of the State Legislature then resorted to the drastic step of attempting to pass the Bill without the Governor; and ordered that a "Resolution" for that purpose be filed with the Secretary of State as and for a Congressional "Apportionment Act."

Thereupon a Bill in Equity was brought by Smiley, "as a citizen, elector and taxpayer" to restrain the Secretary of State from proceeding to hold any elections under that Act. The Complaint specifically charged (among other things) that the Districts were

> "• • • so arbitrary and unfair as to violate the provisions • • • to the Federal Constitution."

The Minnesota Court, however, specifically brushed aside that contention saying (among other things):

> "We • • • are of the opinion that the 14th Amendment was in no way violated."

It is obvious and conclusive, therefore, that in the Minnesota case, the State Court specifically ruled upon the precise Federal Constitutional question raised in the case at bar.

The Report of the case in this Court shows that the case there, also, was treated as a "Bill in Equity". The "Statement" of the Report says on this point that the Complaint below was

> "• • • a suit to enjoin the Secretary of State of Minnesota from acting under a measure purporting to redistrict the State for Congressional elections. *The Bill sought to have all filings for nomination declared illegal.*"

The "equity" aspect of the Minnesota case is further shown by the language of the Opinion of the Court speaking through Chief Justice Hughes where it is said, among other things:

> "The suit was brought by the Petitioner as a 'citizen, elector and taxpayer' of the State to obtain a judgment declaring invalid all filings for nomination • • • and to enjoin the Secretary of State" etc.

Exact Counterpart of this Case as to "Equitable" Relief, etc.

It will thus be seen that both in the State courts of Minnesota and in this Honorable Court, the *Smiley* v. *Holm* case was treated and considered almost as an exact counterpart of the case at bar so far as "Equitable" relief is concerned; since both cases involve a proceeding "to obtain a judgment declaring invalid" the State Apportionment Act in question, "and to enjoin" the State Election Officials from acting under it.

This Honorable Court by its judgment (as already indicated) reversed and reman-ed the *Smiley* v. *Holm* case "for further proceedings not inconsistent with this Opinion." The result was (as Chief Justice Hughes stated in his Opinion) that the Minnesota Act was stricken down in toto; and all 9 Congressmen from Minnesota were elected "at large," at the November 1932 election.

We do not propose here to go into a discussion of the merits of the *Smiley* v. *Holm* case, and the Constitutional questions involved. We merely set forth the foregoing factual "Story" to show *first* that this Court took jurisdiction of the case; and *second*, that this Court, indirectly but actually, granted injunctive relief against the Minnesota State Election Officials, to restrain them from proceeding under an invalid State Congressional Apportionment Act.

The New York Case of 1932

The next case in point of time to reach this Honorable Court, growing out of the Act of Congress of 1929 above mentioned, was the New York case of *Koenig* v. *Flynn*,

Secretary of State, 285 U.S. 375 (affirming the Court of Appeals of New York, 258 N.Y. 292, 179 N.E. 705).[6] Under the 1929 Act of Congress, New York became entitled to 45 Congressmen instead of 43. Accordingly in April 1931, the Legislature of New York, in an obvious effort to circumvent a probable veto of the Governor of the State, attempted to pass a mere "Resolution" (Joint Resolution April 10, 1931) reapportioning the State into 45 Districts. Thereupon Koenig, as a citizen and elector challenged the validity of that action of the Legislature by a proceeding directed against the Secretary of State, seeking to prevent him from taking any steps to conduct elections under the Act. The Opinion of the Court of Appeals of New York is largely devoted to the question whether the requirement of the Act of Congress of August 8, 1911 (37 Stat. 14) concerning "equality" in Congressional Districts was still in force and effect, notwithstanding the Act of Congress of 1929 reallocating the members of the House of Representatives among the various States. On this point the New York Court held (among other things) that the principle of "equality" announced in the Act of 1911, *"Was still in full force and effect as a regulation to be followed"* (by the States). The New York Court went on to say:

> *"Even if we were to take a different view, our conclusion would be, that by the Act of 1911, and the similar Acts that proceed it, there had been a practical recognition by the Congress of the just and reasonable rule to be followed in the absence of statute."*

The New York case was promptly taken to this Court, which granted Certiorari on March 15, 1932, (285 U.S. 532). It is interesting to note that the case was treated as an emergency matter, since it was argued nine days later, on March 24, and was decided on the same day as the Minnesota case, *ante*, and on April 11, 1942.

The point to be stressed in this "story" is that the New York case was a second instance in the year 1932 where this

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[6] For the *Koenig* v. *Flynn* case in the intermediate courts of New York, see 253 N. Y. S. 554 and 254 N. Y. S. 339.

Court took jurisdiction of a case involving the constitutionality and validity of an arbitrary and unequal State Congressional Reapportionment Act.

The Missouri Case of 1932

The State of Missouri lost two members of Congress, as a result of the Act of Congress of 1929 above mentioned. In 1931 the Missouri Legislature attempted to pass a Congressional Apportionment Act containing Districts that were grossly arbitrary and unequal in their population. Accordingly one Carroll, a citizen and elector and taxpayer, challenged the validity of the Act in the State Courts. (*Carroll* v. *Becker, Secretary of State,* 328 Mo. —, 45 S.W. (2d) 533.) In Missouri, as in Minnesota and in New York, the Legislature attempted to defy the State Governor about the necessity of creating fair and equal Congressional Districts; but the Missouri Governor vetoed the Bill. In Missouri, as in the other two States, the Legislature attempted to get around the Governor's opposition by passing a mere "Resolution" to establish the Congressional Districts. The Missouri Court in January 1932 (contrary to the holding of the Minnesota court) struck down the Missouri "Resolution" and held it invalid. It did so particularly on the ground of lack of "equality" in the Congressional Districts. In so doing the Missouri Court said:

> "Whatever the United States Supreme Court may decide about the continued validity or expiration of the Act of 1911" (the provisions about equality etc.) "the terms of Sections 3 and 4" (of that Act) "are significant as an Congressional interpretation of Section 4, Article I of the (Federal) Constitution."

In other words the Missouri Court squarely held that the Federal Constitution was involved and was violated by the "unequal" provisions of the Missouri Statute.

The case was taken to this Honorable Court, which granted Certiorari March 22, 1932 (285 U.S. 534). It is interesting to note that here again this Court took the case as an emergency matter. This Court heard oral argument in the Missouri case *two days* after Certiorari was granted.

The case was argued March 24th, being the same day the Court heard argument in the New York case, *ante.*

This Court decided the three cases, from Minnesota, from New York, and from Missouri, all on the same day, namely April 11, 1932. In the New York case and in the Missouri case this Honorable Court decided those cases merely on the holding and the rulings and the views expressed in its opinion in the Minnesota case of *Smiley* v. *Holm, ante.*

Significance of Timing etc.

It is significant and worthy of special comment that this Honorable Court in April 1932 had before it at the same time the three cases from Minnesota, New York and Missouri, discussed above. Accordingly it must be assumed that this Court gave special attention to the general subject matter of those cases. The Opinion of this Court in the Smiley v. Holm case, therefore, takes on a special significance; since there were three cases decided together on that day, all involving the same point.

Mississippi Case of 1932

The next case in point of time came before this Honorable Court in October 1932. This case involved a State Congressional Apportionment Act and is the widely discussed case of *Wood* v. *Broom,* 287 U.S. 1. By the Act of Congress of June 18, 1929, above mentioned, the number of Congressmen from Mississippi was reduced by one. Thereafter the Mississippi Legislature in the Spring of 1932 adopted a new Congressional Apportionment Act. That Act was promptly challenged before a Three-Judge Federal Court, in the same manner as in the case at bar, and for the same reasons. The Complaint showed that the Districts in Mississippi under that Act varied in population from 184,000 to 414,000. The Three-Judge Federal Court sustained the Complaint of the citizens and struck down the Act in question, because of the gross inequalities which it permitted in voting power. (1 Fed. Supp. 134). However the case in the Trial Court, as well as the case in this Honorable Court, was bottomed largely on a claimed violation of the "equality" provisions of the Act of Congress of 1911; and the question of the

violation of the Federal Constitution was only incidentally raised and discussed, either in the Trial Court or in this Court.

The case was promptly taken to this Court on Appeal, where the printed Record was filed in the Clerk's Office of this Court October 2, 1932. This Court took the case and again gave the case emergency consideration since the case was heard on Oral Argument October 13, 1932. The Opinion in the case, written by Chief Justice Hughes, was filed October 18, 1932, five days after the Oral Argument. The shortness of time taken for considering this case should be compared with the full consideration given by this Honorable Court to the three cases of *Smiley* v. *Holm, ante, Koenig* v. *Flynn, ante,* and *Carroll* v. *Baker, ante,* which had been decided in April of the same year.

The significant point to be stressed in this Jurisdictional Statement is that this Honorable Court took jurisdiction of the Mississippi case and disposed of it on the merits, just as it had done in the Minnesota case already discussed, and in the New York and Missouri cases.

The Kentucky Case of 1932

One more case before this Court in the year 1932 remains to be mentioned in order to complete this "story" about State Apportionment cases before this Court in the year 1932. The State of Kentucky also had lost one Congressman as a result of the Act of Congress of 1929 already mentioned. Thereafter the General Assembly of Kentucky in the Spring of 1932 passed a State Congressional Apportionment Act. That Act, however, set up Districts that were so unequal and arbitrary that it was challenged before a Three-Judge Federal Court, just about the same time that the Three-Judge Federal Court in Mississippi (already mentioned in the discussion of *Wood* v. *Broom*) was sitting. The Federal Court in Kentucky like the Federal Court in Mississippi struck down the State Apportionment Act because of its grossly discriminatory and unequitable provisions as to Districts. (*Hume* v. *Mahan,* 1 Fed. Supp. 142.) The effect of the Kentucky District Court judgment was similar to the effect of the Mississippi District Court judgment; in that all

Congressmen elected from Kentucky and from Mississippi in the November 1932 elections were nominated and elected "at large."

The Kentucky case was carried to this Court, where it was decided in November 1932. (*Mahan, Secretary of State,* v. *Bruce,* 287 U. S. 575.) In view of the prior decision of this Honorable Court a few weeks earlier in the *Wood* v. *Broom* case, *ante,* this Court merely filed a Memorandum "Per Curiam" Opinion, referring to the *Wood* v. *Broom* Opinion and stating that the ruling in that case was controlling in the Kentucky case.

Summary as to These 1932 Cases. A "Twilight Zone"

Such was the state of the law, so far as the Reports and Decisions of this Honorable Court are concerned, in regard to State Congressional Apportionment cases for many years following the calendar year of 1932. In view of the conflicting principles of law, which of necessity are found in any sensible appraisal of the doctrines of this Court as announced in *Smiley* v. *Holm, ante,* discussed above, and the doctrines announced six months later in the case of *Wood* v. *Broom, ante,* discussed above, any competent Election Lawyer thereafter would be compelled to say that there existed what may be called a "twilight zone" in the law, with respect to the jurisdiction and holding of this Honorable Court in regard to the subject of State Congressional Apportionment cases. Indeed it was out of the fact that this "twilight zone" existed in the law that the idea and suggestion came to the undersigned Counsel for the starting of the litigation involved in *Colegrove* v. *Green, ante.* We need not argue here the point that the final result of the Opinions of this Court in the *Colegrove* v. *Green* case, *ante,* (whatever else it may have done) confirms the existence of that "twilight zone" in the law.

Insofar as it is proper for Counsel to make the observation, it must be said that that "twilight zone" was not cleared up by the Court in the *Colgrove* v. *Green* case; but that on the contrary it was enlarged and made still more obscure so far as the ability of the practicing lawyer to say what is the state of the law is concerned. We, therefore,

say with the utmost respect but with much earnestness that the *Colegrove* v. *Green* case, and the divided Opinions rendered in that case has added confusion to the state of the law rather than reducing it. Such must be the realistic appraisal and summary which any competent Election lawyer must make with regard to these State Apportionment cases, when the full "story" of the five cases before this Court in 1932 is added to the final chapter of that story, as found in the *Colegrove* v. *Green* case, *ante*, decided in 1946.

Accordingly a short summary is here given about the *Colegrove* v. *Green* case *per se*.

The Illinois Congressional Case of 1946

It is unnecessary and it would not be helpful in this "Appendix" to discuss in detail the issues involved in the *Colegrove* v. *Green* case, *ante*, decided by this Court June 10, 1946; nor to discuss the Petition for Rehearing in that case which was denied by this Court October 28, 1946, nor to discuss the Reargument before the Full Bench which was also denied by this Court November 18, 1946. With respect to these two latter matters we respectfully suggest that this Court take into consideration the printed "Suggestions" filed by this same Counsel in the "Illinois Congressional Case" last Summer.

With this commentary we conclude our discussion of the "Illinois Congressional Case", the aspects of which are thoroughly familiar to the seven members of this Court who considered and decided it.

"Equitable Relief" in Election Cases

One of the vigorous objections of the Attorney General of Illinois in his Motion to Strike the Complaint in the case at bar and in his Oral Argument and Brief in the Trial Court was the contention that no Court had any jurisdiction to grant what he called "equitable relief" in election cases. (That same objection had been vigorously presented by the Attorney General of Illinois both in the Trial Court and before this Honorable Court in the "Congressional Apportionment Case" of 1946.) In his Brief and Argument in

the Trial Court in this case (just as in his Argument in the "Congressional Apportionment Case" of 1946) the Attorney General of Illinois has pinned his hope on what he contends is the ruling and the holding of this Court in the well known case of *Giles* v. *Harris*, 189 U. S. 475, decided in 1903 (the Opinion being written by Justice Oliver Wendell Holmes). Mr. Justice Black in his dissenting Opinion in the *Colegrove* v. *Green* case, decided last June, 66 S. Ct. 1998, pays his respects to that contention of the Attorney General of Illinois regarding the force and effect of the *Giles* v. *Harris* case, when he says:

> "*Giles* v. *Harris* • • • did not hold that a court could not or should not exercise its power in a case like this."

The plain truth is, as Mr. Justice Black shows in his dissenting Opinion, that the *Giles* v. *Harris* case merely stands for the proposition that equity would not "supervise" an election, where this Court had been called upon to protect the election rights of more than 5,000 potential Plaintiffs.

We do not propose here to whittle fine shavings, as the Attorney General of Illinois has done below and in the prior "Congressional Case" in this Court, as to the effect, so far as "equity" is concerned, of the *Giles* v. *Harris* case. On the contrary we leave the whole matter to the sense and discretion of this Honorable Court.

A New and Undiscovered Case

We do, however, desire at this point to comment upon what is in reality a new and undiscovered case, decided by this Court concerning the right and duty of a Court of Equity in election cases, *Love* v. *Griffith*, 266 U. S. 32. The Opinion likewise was written by Justice Oliver Wendell Holmes. The case being in 1924, two decades after *Giles* v. *Harris*.

If there is one idea in legal research which a good lawyer must never forget it is the necessity of repeated and constant gleaning in the harvest-fields of the law, if he is to be sure that he has not overlooked an important case. It was an application of that idea which finally located for us the

case we are now about to discuss; a case which we are sorry we did not have and did not cite in our Argument and Discussion of the Congressional Apportionment case of 1946.

By one of those strange quirks, which sometimes happen in the headnotes of the "Digests", there is no mention whatever in the ordinary "Search Books" about the doctrine of this case of *Love* v. *Griffith*, insofar as "equitable relief" in elections is concerned. The *Love* v. *Griffith* case is actually a sort of "undiscovered" case so far as the doctrine, regarding "equitable relief" in election cases is concerned; and so far as that doctrine may be discovered from the ordinary use of the Search Books of the law.

The case of *Love* v. *Griffith* arose in Texas, where it is reported in 236 S. W. 239. It there appears that Love and several other colored citizens, who were "qualified electors", brought a Bill in Equity against the local Texas Election Officials to "restrain" them from preventing the Plaintiffs from voting at a Primary Election to be held February 9, 1921. The Bill specifically charged that the Defendants "threatened" to deprive the Plaintiffs of the right to vote "under the Federal and State Constitutions."

The Plaintiffs made application for a Temporary Injunction four days before the holding of the election above mentioned. The Defendants filed a General Demurrer to the Plaintiffs' Bill and that Demurrer was sustained by the Trial Court. An Appeal was taken to the Texas Reviewing Court but the Appeal was not reached until December 21, 1921, *ten months after the election.* The Reviewing Court thereupon affirmed the judgment of the Trial Court on the bare ground that the litigation was "moot", since the election had long since passed.

Thereafter the case was taken to this Honorable Court on a Writ of Error and this Court took jurisdiction of it. The case was argued before this Court October 6, 1924, and was decided October 20, 1924—*almost four years after the election had been held.* The Opinion of this Honorable Court, as we have said, was written by Mr. Justice Holmes and for obvious reasons is short. That Opinion says in part:

> "This is a Bill in Equity alleging • • • that the judges of election had threatened to enforce a rule"

(prohibiting negroes from voting) "contrary to the Constitution of the United States; and praying an injunction * * *".

It therefore clearly appears that the case was an equity proceeding in every sense of the word. No clearer equity case in election matters could possibly be imagined. Mr. Justice Holmes announced the view of this Honorable Court on that situation as follows:

> *"Whether the right (to vote) was denied, or not given due recognition by the Texas Court is a question to which the Plaintiffs are entitled to invoke our judgment. If the case stood here as it stood before the Court of first instance, it would present a grave question of constitutional law and we would be astute to avoid hindrance in the way of taking it up."*

This language can only mean one thing; that if the case had not been moot this Honorable Court would have taken it on the merits and decided it, notwithstanding the fact that it was a plain Bill of Equity in an election case. But Justice Holmes points out that the holding of the Texas Reviewing Court was merely to the effect that the "cause of action had ceased to exist" and, therefore, the whole matter was moot and could not be reviewed.

The Philosophy of this Doctrine

Every competent election lawyer is familiar with the principle that equity ordinarily cannot give adequate or helpful relief in connection with the holding of an election. It is for that reason that the adjudicated cases have many repetitions of the principle that equity cannot be resorted to in the actual conduct of elections. That principle is specifically sound and uncontestable as a matter of good law and commonsense.

But here in the case at bar (just as in the *Love* v. *Griffith* case) a different situation exists. In the case at bar the Court of Equity is merely asked to strike down a vicious and inequitable and unjust statute, under which elections will be held illegally, if the statute is permitted to prevail.

That is a totally different situation from asking a Court of Equity to "supervise" an election—which was the real basis of the holding of this court in the *Giles* v. *Harris* case.

We, therefore, respectfully say to this Court that the Court should clarify this confusion that exists in the law with respect to the assumed paralysis of a Court of Equity wherever the word "elections" is raised in any litigation. A Court of Equity began its existence as a forum where the rights of litigants would be protected under circumstances where such rights could not be protected under the rigid actions of the common law. Why should not that doctrine prevail in modern times where atrocious and vicious denials of the rights of citizens are shown? And where the Defendants have the temerity to come forward and say merely "No, Equity has no jurisdiction"?

We leave this question to be decided by the Court.

Summary as to this Appendix II

Counsel for Appellants is not insensible to the point that it is somewhat unusual to add to a "Statement of Jurisdiction" in this Court on the presentation of an Appeal, such a "Commentary" as that appearing in this Appendix II. Nevertheless, we feel that, in view of all of the circumstances and implicit factors involved in this over-all issue of the jurisdiction of this Court in State Apportionment Cases (concerning either Congressional Apportionment or State Legislative Apportionment), it is a sensible and, we hope, helpful thing to have done that in the case at bar.

Accordingly the matter is respectfully submitted to this Honorable Court with full confidence that the Court will accord these Appellants such attention on this Appeal as the facts and circumstances of the case may justly warrant.

Respectfully submitted,

URBAN A. LAVERY,
Attorney for Appellants.

Dated at Chicago, Illinois,
February 13, 1947.

FEB 15 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1031

KENNETH W. COLEGROVE, PETER J. CHAMALES, AND JEROME G. KERWIN,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS AND AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS; DWIGHT H. GREEN, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS, AND ARTHUR C. LUEDER, AS A MEMBER EX-OFFICIO OF THE PRIMARY CERTIFYING BOARD OF THE STATE OF ILLINOIS,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM—BRIEF IN SUPPORT OF MOTION.

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Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM—BRIEF IN SUPPORT OF MOTION.

The appellants, who are Illinois citizens and voters, filed this proceeding for injunction and declaratory judgment against appellees, who, as Illinois' Secretary of State, Governor and Auditor, respectively, comprise *ex-officio* Illinois' Primary Certifying Board.

Asserting that the Illinois State Senatorial and Representative Reapportionment Act of 1901 (Ill. Rev. Stats.

1945, Ch. 46, pars. 157, 158, pp. 1590-93) violates the constitutions both of Illinois and the United States because the senatorial districts which it creates no longer contain approximately equal populations, appellants seek to inhibit by injunction or declaratory judgment or both the holding of all future elections to the Illinois General Assembly under this statute.

Since neither appellants nor we are able to point to any provisions of law, state or federal, constitutional or statutory, under which elections to the Illinois legislature can be held at all if elections under the present act are prevented, presumably if the relief sought were to be granted, no election whatsoever of state senators or representatives could be held in Illinois until and unless the Illinois General Assembly should agree upon and pass a new senatorial apportionment act.

More specific exposition of the appellants' allegations of fact and conceptions of law appears in appellants' jurisdictional statement and need not be repeated here.

Suffice it to say in brief summary that under the act here assailed and under sections 6, 7 and 8 of Article IV of the Illinois Constitution of 1870, quoted in appellants' jurisdictional statement, three members of the lower house are to be elected every two years from each of the 51 senatorial districts into which the state is partitioned; and every four years one half of Illinois' fifty-one senators are elected, elections in odd numbered districts occurring in years evenly divisible by four and elections in even numbered districts occurring in so-called "off" years, that is, years divisible by four with a remainder of two.

With respect to the United States Constitution, the appellants contend that the 1901 act violates the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the

United States, the "guarantee of Republican Form of Government" embodied in section 4 of Article IV of that Constitution, the "Preamble of the Constitution," and the "Spirit of the Federal Constitution"; and appellants invoke the "Declaration of Independence." Appellants also contend that the act violates the Northwest Ordinance of 1787 and an alleged compact for equal representation which the appellants discern as resulting from an integration of the original Illinois Constitution of 1818 with the Enabling Act of Congress granting statehood to Illinois (April 18, 1818, 3 Stats. 428) and from the references in such original Illinois Constitution and Enabling Act to the Northwest Ordinance.

Appellees filed a motion to dismiss the suit in the nature of a demurrer to appellants' complaint.

The district court rendered the opinion and judgment set forth in appellants' jurisdictional statement.

The issues of law emerge from the appellees' motion to strike appellants' complaint and appear in the brief in support of the motion in this court to dismiss or affirm.

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Appellees

MOTION TO DISMISS THE APPEAL, OR, IN THE ALTERNATIVE, AFFIRM THE JUDGMENT APPEALED FROM WITHOUT FURTHER BRIEFS OR ARGUMENTS.

Appellees, for the reasons stated and argued in the brief in support of this motion, respectfully move this Honorable Court either to dismiss the appeal for want of jurisdiction,

to dismiss it for want of a substantial federal question, or to affirm the judgment appealed from without the filing of further briefs or the presentation of further arguments.

GEORGE F. BARRETT,
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Attorney for Appellees.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

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Appellees

BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM

Reference to Statement Opposing Jurisdiction for Statement of the Case

The case is stated in the "Statement Opposing Jurisdiction of this Court," to which statement reference is here made to avoid repetition of substance thereof.

ARGUMENT

I

The Federal Courts Would Have Neither the Practical Nor the Jurisdictional Power to Grant Relief in This Case Even If the Appellants Asserted Any Substantive Federal Constitutional Right.

Under Point II of this Argument, *post*, we undertake to argue that under the teachings of this court's applicable decisions, the federal constitution does not guarantee the supposed rights asserted by appellants. But because it is so very clear the federal courts would be without competence, either practical or jurisdictional, to afford any relief to appellants even if their substantive thesis were well conceived and because jurisdictional considerations properly precede those of substantive merits, we first show that the federal courts could not, either practically or consistently with their limited jurisdiction, grant any relief even if the appellants had the rights which they claim.

Appellants ask the federal courts to pronounce invalid the present Illinois Senatorial Reapportionment Act and to interdict by injunction or by declaratory judgment all elections under that statute. But they do not suggest and we cannot conceive under what auspices any election to the Illinois General Assembly could be held should the court prohibit elections under the presently standing law.

In *Wood* v. *Broom*, 287 U. S. 1, and *Colegrove* v. *Green*, 328 U. S. —, 66 S. Ct. 1198, the electors who claimed impairment of their franchise could at least point to a federal statute authorizing election of congressmen at large in the event that the state failed to pass appropriate apportionment acts. Thus, although this court declined relief in both *Wood* v. *Broom* and *Colegrove* v. *Green*, declaring in

both cases that equity could not or should not act in the premises, at least three was no suggestion that the granting of relief sought would prevent *all* elections, thereby disenfranchising all voters of the state until the General Assembly should agree upon and pass a new act.

If, as this court held in *Wood* v. *Broom* and *Colegrove* v. *Green*, equity either lacked or should not exert jurisdiction because of practical considerations exigent in those cases, *a fortiori* the district court properly declined to act in the instant case.

But there are jurisdictional as well as practical inhibitions against action by the federal judiciary in the instant case. In the first place, inasmuch as this is not a suit by one or a small group of private individuals to restrain a private tort threatened against them individually by state officials but is a suit that seeks to coerce by judicial process the election officials of the entire State of Illinois in all future state elections, it is either a suit against the state, in which case it is inhibited by the doctrine of sovereign immunity (cf. *Governor of Georgia* v. *Madrazo*, 26 U. S. 110; *New York Guaranty Co.* v. *Steel*, 134 U. S. 230; *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446, and *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, with which cf. *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371), or if the declaratory judgment be deemed merely advisory or hortatory, the suit seeks no judicial relief whatever but asks the mere pronouncement of a dictum. (Cf. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, sustaining the Declaratory Judgment Act upon the principle that it is applicable only where relief by process can ultimately be granted if necessary.)

This court has recognized that, according to the tenor of some of its opinions, equity has no jurisdiction to act in political matters and, according to the reasoning of other

opinions, such jurisdiction, if it exists, will not be exercised where the result will be wholesale interference with an election. (See *Giles* v. *Harris,* 189 U. S. 475, in which Mr. Justice Holmes denied relief even though the violation of federal constitutional rights of negroes was clear and although the Civil Rights Act was specifically invoked; concurring opinions of Justices Brandeis, Stone, Roberts and Cardozo in *Wood* v. *Broom,* 287 U. S. 1, at page 8, the majority of the court not reaching the jurisdictional question because they perceived the complaint in that case to be clearly without substantive merit; opinion of Justices Frankfurter, Reed and Burton in *Colegrove* v. *Green, supra,* indicating that equity jurisdiction to act by injunction or declaratory judgment does not exist in political matters, and the concurring opinion in that case of Mr. Justice Rutledge assuming that jurisdiction may exist but bespeaking forbearance of its exercise.)

It is submitted that the considerations above developed conclusively demonstrate that the federal courts would have neither the practical nor the jurisdictional competence to grant relief in this case even if the appellants' substantive constitutional conceptions wre well entertained.

In *Cook* v. *Fortson,* 67 S. Ct. 21, — U. S. — (not yet officially reported), this court dismissed an appeal from the judgment of a three-judge district court in Georgia denying injunction and declaratory judgment although the "county unit" system of elections gave two unit votes to Quitman County, with a population of only 3,435, and only six unit votes to Fulton County, with a population of 392,-886. Although this court did not assign a reason for its refusal, the case is obviously pertinent and, we believe, controlling; for whether review was denied upon jurisdictional or substantive grounds (see Point II, post), the case would

appear to be indistinguishable from the case at bar in terms of any important constitutional principle.

Appellants' "Five Similar Cases" Support Appellees', Not Appellants' Arguments

Appellants' jurisdictional statement observes that this court took jurisdiction in each of five allegedly similar cases, namely, *Smiley* v. *Holm*, 285 U. S. 355; *Koenig* v. *Flynn*, 285 U. S. 375; *Carroll* v. *Becker*, 285 U. S. 380; *Wood* v. *Broom*, 287 U. S. 1, and *Mahan* v. *Bruce*, 287 U. S. 575.

Smiley v. *Holm*, *Koenig* v. *Flynn*, and *Carroll* v. *Becker* were writs of *certiorari* to state courts of last resort. In none of these cases was a federal court asked to grant relief by injunctive or other federal judicial process. In each of these cases a state court, *agreeably to the states' modes of judicature*, had passed upon the important federal constitutional question, whether a reapportionment act passed by the legislature but vetoed by the governor derived its efficacy from the Constitution of the United States without gubernatorial approval, or whether such approval, when required by the state constitution, was a part of the legislative process contemplated by the federal constitution. This court's writ of *certiorari* was of course efficient to reach any judgment rendered in accordance with state adjective law that decided a federal constitutional question.

Wood v. *Broom* and *Mahan* v. *Bruce* were appeals from federal district courts. *But in those cases four of the justices held federal equity impotent and five justices did not reach the question because they held that there was no federal constitutional right to approximate equality of representation.* Thus, each of these cases either fails to support or is positively adverse to appellants' position in the instant case.

The Federal Courts Cannot Properly State Constitutional or Other Questions in This Case

If, as we have argued, this court has neither the practical nor the jurisdictional competence to decide this case, or, if, as we argue under Point II, *post*, federal questions presented are not substantial, then there being no diversity of citizenship, there is no basis of federal jurisdiction upon which to predicate relief arising under state constitutional or other law.

But in any event, if the federal courts had jurisdiction to dispense state jurisprudence they would be bound to do so as though they were state courts of equity. And appellants' own jurisdictional statement demonstrates conclusively that Illinois state courts of equity will not grant relief by preventing elections under the Illinois Reapportionment Act of 1901.

II

Appellants Show No Violation of Any Federal Constitutional Right

Appellants' substantive contentions are conceived upon the thesis that the United States Constitution guarantees a right of approximate equality of representation. Unable to point specifically to any provision in the Constitution guaranteeing such a right in explicit terms, appellants invoke the preamble, the "guarantee of a Republican Form of Government" (Art. IV, sec. 4), the Fourteenth Amendment, the spirit of the Constitution, and the Declaration of Independence.

Appellants' contentions are not supported by any holding of this Court declaring that approximate quality in representation is a canon of equal protection, republican form of government, or other specifically guaranteed federal con-

stitutional rights. *Wood* v. *Broom*, 287 U. S. 1, where the claim of constitutional right was expressly raised, holds the contrary.[1] Let us therefore examine the argument on principle.

Even if it be true that approximate equality of representation, at least in the lower house of a congress or a state legislature, is generally regarded as a *desideratum* of enlightened political philosophy, nothing is plainer than that no such doctrine has ever been admitted as a principle of American constitutional law. On the contrary, the negation of any such principle very plainly results from the following considerations:

At the time of the writing and adoption of the original Constitution, slaves could not vote in the South, women could not vote in any state, those not holding freehold tenures in land could not vote in many states, and, as is the case even today, even full fledged citizens not under any other disability can not vote unless they had inhabited the state for a given length of time—in Illinois at the present time, for instance, for a period of one year.

None of the disqualifications, whether on the basis of race, color, previous condition of servitude, sex, estate, length of residence, or otherwise, was removed by the *Fourteenth* Amendment to the Constitution of the United States.

The Fourteenth Amendment, far from inhibiting the denial of suffrage, explicitly contemplates and provides

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[1] In *Wood* v. *Broom*, the appellants, electors of the State of Mississippi, assailed the Mississippi Congressional Reapportionment Act on the ground that, as summarized by Mr. Chief Justice Hughes,

> "the Act violated Article I, section 4, and the Fourteenth Amendment, of the Constitution of the United States"

as well as other grounds. A majority of the court rejected this contention, the minority of four not reaching it because they held that the court had no jurisdiction to entertain it.

for the denial of such suffrage on the ground of race or other basis.

Section 2 of the Amendment reads as follows:

> "Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged,* Except for participation in rebellion, or other crime, *the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.*" (Emphasis added.)

In other words it was the intent of the *Fourteenth* Amendment that a state must choose between granting equal right of suffrage where male inhabitants were concerned, or suffering an abridgment of its representation in the national government. But nevertheless the choice might be made by the state; and if it was willing to submit to a diminution of representation, it might, so far as any group of male citizens was concerned, disenfranchise them at will. *It was because the Fourteenth Amendment did not guarantee equality of the ballot that the Fifteenth and Nineteenth Amendments were necessary.*

It took the *Fifteenth*, not the *Fourteenth*, Amendment of the Constitution of the United States to inhibit disqualification from voting on the ground of "race, color or previous condition of servitude." And it took the Nineteenth, not the Fourteenth, Amendment to inhibit disquali-

fication on the ground of sex. Of course, the appellants do not suggest that either the Fifteenth or Nineteenth Amendment vests them with any rights in this case. Nevertheless the Fifteenth and Nineteenth Amendments are most important in this case for they demonstrate conclusively that, but for those amendments, there is no constitutional right to equality of representation in any respect whatever; and those amendments guarantee, respectively, only that no such equality shall be impaired on the grounds of race, color or sex.

But is there, as the appellants suggest, some "spirit" immanental within the Constitution of the United States that intends, even if it does not explicitly utter the principle that there shall be a right of equal representation?

Let us see. While the Constitution of the United States does contemplate that there shall be approximate equality of representation on the basis of population in the lower house of Congress so far as state lines are concerned (although not so far as congressional district lines are concerned, *Wood* v. *Broom*, cited *ante*, where a majority of the court explicitly rejected the argument that the constitution requires approximate equality of representation in Congress, see Point I, *ante*), the Constitution of the United States denies equality of representation in the senate; and the house of representatives is powerless to pass any act, however trivial, without the concurrence of the upper house of Congress, in which equality of representation is explicitly denied.

Moreover, the Constitution of the United States does not contemplate or require that there shall be approximate equality in the matter of votes for President and Vice President. This provision, whereby a minority of the people may choose the chief magistrate of the land, has long been deplored by political idealists. It is neverthe-

less the constitutional law of the United States of America.

We have already cited *Cook* v. *Fortson, supra*, as embodying this Court's pronouncement that it would not review where state elections are conducted by the "county unit" system, a system similar to that of the electoral college, notwithstanding great inequalities in the ratio of population representation to unit votes.

The truth is that approximate equality of representation has long been cherished as an ambition on the part of academicians in the field of political theory, such as are two of the appellants in the instant case. But this ideal, far from finding expression or implication in the Constitution of the United States or its "spirit," finds in that spirit complete negation.

Appellants' Claims Founded on the Northwest Ordinance, the Illinois Enabling Act of 1818, and the Constitution of 1818 Are Without Merit.

So far as the appellants rest their claims upon the Northwest Ordinance, either as standing alone or as integrated with the Illinois Enabling Act or the Constitution of 1818, it is sufficient to say that so to construe the Ordinance would be to confer upon the citizens of Illinois federal rights not enjoyed by the thirteen colonial states, the Western states or the Southern states. This would indeed deny "equal protection." The Northwest Ordinance was pressed upon the Supreme Court in *Colegrove* v. *Green* but was not even mentioned by the court.

Conclusion

For the reasons urged in the foregoing brief, it is respectfully submitted that this Court should either dismiss the appeal for want of jurisdiction, dismiss it for want of

a substantial federal question, or affirm the district court without further briefs or argument.

Respectfully submitted,

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(9272)

No. 1031. COLEGROVE ET AL. *v.* BARRETT, SECRETARY OF STATE OF ILLINOIS, ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. March 10, 1947. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. In view of the Court's refusal to grant rehearing in *Colegrove* v. *Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, 828, and its dismissal of the appeals in *Cook* v. *Fortson* and *Turman* v. *Duckworth*, 329 U. S. 675, rehearing denied, 329 U. S. 829, MR. JUSTICE RUTLEDGE concurs in the dismissal of this appeal. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY are of the opinion that probable jurisdiction should be noted. *Urban A. Lavery* for appellants. *George F. Barrett*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for appellees.